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Supreme Court, U.S.
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OFFICE OF THE CLERK
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No. 08-

IN THE

Supreme Court of the United States

DONALD A. MILLER,

Petitioner,

v.

GRAY DAVIS, as an individual; ARNOLD SCHWARZENEGGER, as an individual; ED WILLIAMS, as an individual; CALIFORNIA DEPARTMENT OF CORRECTIONS, a department of the State of California; CALIFORNIA BOARD OF PRISON TERMS, a department of the State of California; THOMAS BORDONADO, as an individual; WILLIAM DUNCAN, as an individual; TED RICH, as an individual; FERNANDO VAZQUEZ, as an individual; DIANE LUSHBOUGH, as an individual; MANUEL ORTEGA, as an individual; CAROL BENTLEY, as an individual; JOHN W. GILLIS, as an individual; RON E. KOENIG, as an individual; RICHARD PATTERSON, as an individual; ROBERT B. PRESLEY, as an individual; and DOES 1-10 inclusively,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD HAMLISH
Attorney for Petitioner
910 G Hampshire Road
Westlake Village, CA 91361
(805) 497-6632

217352

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Can a public official (Governor of the State of California) exceed his jurisdiction where he had absolutely no jurisdiction whatsoever over the matter at issue, i.e. can one exceed jurisdiction when he/she never had any jurisdiction in the first instance?

2. Where a public official has no jurisdiction as to a particular matter, does he/she act in clear absence of jurisdiction when he exercises jurisdiction in that matter?

3. Where a public official is in error of the extent of his jurisdiction, does that mistake entitle him to absolute immunity or merely qualified immunity?

4. Are members of the parole board entitled to absolute immunity or qualified immunity for conduct which is within the course and scope of their authority and/or duties?

5. Are members of the parole board entitled to absolute immunity for conduct which is clearly outside the course and scope of their authority and/or duties?

6. Should members of the parole board be denied quasi-judicial [absolute] immunity based on the fact that parole hearings are not adversarial hearings and one of the basic elements for a quasi-judicial hearing is that it is adversarial?

7. Does the Eleventh Amendment apply when a citizen of a state sues an agency of the state of which he is a resident?

8. Is the California Parole Board, an agency of the State of California, entitled to sovereign immunity?

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Petitioner Donald A. Miller respectfully petitions for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The reported opinion of the Court of Appeals is reproduced herewith at Appendix A. The unpublished portion of the opinion of Court of Appeals is reproduced herewith at Appendix B. The orders of the District Court are reproduced herewith at Appendix C and D. The Order denying Petitioner's request for a rehearing and/or rehearing en banc is reproduced herewith at Appendix E.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 8 U.S.C. § 1254(1). The Court of Appeals entered its judgment on April 22, 2008 and the request for rehearing and/or rehearing en banc was denied on May 14, 2008.

STATUTES AND RULES INVOLVED

The pertinent provisions of *42 U.S.C. § 1983* are set forth below:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . ."

The pertinent provisions of the *California Constitution Article V, § 8(b)* are set below:

> "No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person *sentenced to an indeterminate term upon conviction of murder* shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action." (Emphasis added)

The pertinent provisions of *California Penal Code § 3041.1* are set forth below:

> "Up to 90 days prior to a scheduled release date, the *Governor may request review* of any decision by a parole authority concerning the grant or denial of parole to any inmate in a state prison. The Governor shall state the reason or reasons for the request, and whether the request is based on a public safety concern, a concern that the gravity of current or past convicted offenses may have been given inadequate consideration, or on other factors. When a request has been made, a randomly selected committee comprised of nine commissioners specifically appointed to hear adult parole matters and who are holding office at the time, shall review the parole decision. In case of a review, a vote in favor of parole by a majority of the commissioners on the committee shall be required to grant parole to any inmate. In carrying out any review, the board shall comply with the provisions of this chapter." (Emphasis added)

The pertinent provisions of *California Penal Code § 3041.2* are set forth below:

> "(a) During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person *sentenced to an indeterminate prison term based upon a conviction of murder*, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the parole authority." (Emphasis added)

STATEMENT OF THE CASE

In 1980, Petitioner was convicted of conspiracy to commit murder and was sentenced to twenty-five (25) years to life. After imposing sentence but while the appeal was pending, the trial judge granted an appeal bond based on a finding that Petitioner no longer posed a risk to the community or society. Upon exhaustion of his direct appeals, Petitioner began his incarceration in state prison on August 9, 1982.

In 1988, the voters of the State of California voted to amend the California Constitution giving the Governor the jurisdiction and authority to review grants of parole to persons who have been sentenced to an indeterminate prison term upon being convicted of murder. Petitioner had not been convicted of murder and had been sentenced to a determinate prison term of twenty-five years to life. Petitioner did not fall within the parameters of the constitutional amendment.

Petitioner applied for parole in 1996 and parole was denied. Petitioner applied for parole again in 1998 and was again denied. Petitioner applied for parole again in 1999 and the parole board found that Petitioner was suitable for parole. Respondents then unlawfully referred their granting of parole to Respondent Davis, relying erroneously on California Penal Code § 3041.2 and the California Constitution, Art. V, § 8(b).[1] Respondent Davis unlawfully reversed the parole board's decision to grant parole to Petitioner.

Petitioner applied for parole again in 2000 and again the parole board deemed Petitioner suitable for parole and set a date for parole. Respondents again unlawfully referred their granting of parole to Governor Davis and for the second time, erroneously relying on the same P.C. § 3041.2 and Art. V, § 8(b), Respondent Davis unlawfully reversed the parole board's decision.

On August 20, 2001, the California Court of Appeal ordered Respondent Davis to vacate his order reversing Petitioner's parole grant. The Court held that Respondent Davis had no authority or jurisdiction to review or reverse Petitioner's parole. Although Petitioner was entitled to a progress hearing no later than October 19, 2001, Respondents refused to hold a progress hearing but instead referred the matter to an

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1. Respondent Davis and members of the Parole Board were advised prior to February 18, 1999 that Cal. Penal Code § 3041.2 did not grant them jurisdiction or authority to review and/or reverse the granting of parole to a prisoner who had been convicted of a crime other than murder.

en banc hearing of the parole board. On November 13, 2001, at an en banc hearing of the parole board, Petitioner demanded his immediate release. The parole Board refused to take any action. Subsequently on December 19, 2001, Respondents reaffirmed the October 2, 2000 grant of parole. Pursuant to 15 California Code of Regulations § 2044, Respondents were required to release Petitioner immediately but instead merely advanced the parole date to June 18, 2002. On March 20, 2002, relying on P.C. § 3041.1, Respondent Davis requested the parole board review the decision of the parole board to grant Petitioner's petition for parole and rescind it's decision. On April 9, 2002, the parole board again met en banc and reaffirmed the granting of parole to Petitioner. Pursuant to 15 C.C.R. 2044 Respondents were required to release Petitioner immediately but did not. Petitioner was finally released on parole on June 18, 2002. On January 10, 2005, Petitioner filed a Petition for Writ of Habeas Corpus requesting that he be discharged from parole on June 18, 2005 instead of June 18, 2007. Respondents opposed this petition arguing that Petitioner should be on parole until June 18, 2007. On July 21, 2005, the Superior Court issued an order denying the Petition but granting the relief sought by Petitioner and ordering Respondents to discharge Petitioner from parole.

On motion of Respondents, on August 26, 2005, the Superior Court issued another Order clarifying the previous order and granting Petitioner's petition as to discharge from parole. Petitioner was released from parole on August 26, 2005. The Certificate of Discharge

was issued retroactive to June 18, 2005. Subsequently, Respondents filed a Notice of Appeal which appealed the Superior Court's order dated August 26, 2005. The California Court of Appeal denied Respondents' request.

Petitioner filed and served the Complaint on April 11, 2005. On July 14, 2005, Petitioner filed a First Amended Complaint, which is the operative pleading in this matter. On or about August 26, 2005, Respondents Schwarzenegger, California Department of Corrections, California Board of Prison Terms, William Duncan and California Youth and Correctional Agency filed a Notice of Motion and Motion to Dismiss pursuant to Rule 12(b)(6). On September 13, 2005, Respondents Ted Rich, Fernando Vazquez, Diane Lushbough, Manuel 0rtega, John W. Gillis, Ron E. Hoenig and Thomas Bordonado also filed a Notice of Motion and Motion to Dismiss pursuant to Rule 12(b)(6).

On or about February 9, 2006, without any hearing, the court granted the Schwarzenegger, Duncan and State Department Respondents' Motion(s) to Dismiss as well as the Parole Board Respondents' motion. On January 30, 2006, Respondent Gray Davis filed a Rule 12(b)(6) Motion to Dismiss. Without any hearing, on March 8, 2006, the court granted Davis' Motion to Dismiss. A timely Notice of Appeal was filed on April 7, 2006.

REASONS FOR GRANTING THE PETITION

This Court should grant the Writ: (1) In order to resolve issues concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against Respondent Davis [the former Governor of the State of California], and the parole board members who claim quasi-judicial [absolute] immunity for non-quasi-judicial proceedings; (2) Because a district court has so far departed from precedential law and the Court of Appeals sanctioned such a departure by the District Court; and (3) Because a United States District Court and a United States Court of Appeals has decided an important question of law which has not been but should be settled by the Supreme Court; and (4) has decided a federal question in a way that conflicts with the other applicable decisions of the Supreme Court.

Review is warranted where the court has granted quasi-judicial (absolute) immunity based upon a non-quasi-judicial proceeding (a non-adversarial hearing). Review is warranted where both the District Court and the Court of Appeals have applied the incorrect law of immunity as it relates to 42 U.S.C. § 1983.

I. Where The Governor Of The State Of California Transcends The Jurisdiction Conferred Upon Him By The California Constitution And Its Statutes, He Is Acting In Clear Absence Of His Jurisdiction

"O! It is excellent to have a giant's strength; but it is tyrannous to use it like a giant . . ." *William Shakespeare, Measure for Measure, Act. II, Scene 2.* The Court of Appeals acknowledged that Respondent Davis erroneously extended his jurisdiction and authority to review parole decisions of persons convicted of crimes other than murder. The Court of Appeals held that Respondent Davis misinterpreted the statute and was entitled to absolute immunity for those non-quasi-judicial acts. Simply put, Respondent Davis acted in clear absence of jurisdiction; hence no immunity. The constitutional amendment [Art. V, § 8(b)] and the enabling statute [Penal Code § 3041.2] both set forth that the governor only had jurisdiction and authority to review the grant of parole to persons sentenced to an indeterminate sentence upon conviction for murder. Petitioner did not fall into the category of persons that the governor could review because he was sentenced to 25 years to life [a determinate sentence] and was convicted of conspiracy to commit murder [not murder]. Any reasonable attorney [Respondent Davis is an attorney] knew or should have known that § 3041.2 did not apply to the parole of Petitioner.

Respondent Davis knew he was acting beyond his jurisdiction not only because he was advised by his own advisors that the Governor had no jurisdiction or authority to review the parole status of persons who

have been convicted of crimes other than murder but also he is an attorney who knew or should have known of the provisions of the statute.[2] He totally disregarded this advice because of his personal convictions concerning the parole of certain types of prisoners; Respondent Davis made decisions based on purely personal convictions in spite of the law to be contrary.

Petitioner is requesting the Court to determine whether absolute immunity should be afforded to Respondent Davis for his actions in connection with reviews of the state parole board in cases where the crime is other than murder. The California Constitution and statutes are clear, undisputed and unambiguous.[3]

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2. Prior to February 18, 1999, his secretary along with other advisors advised the Governor that his review and reversal of Petitioner's parole would not be a valid action because Petitioner had not been convicted of murder and had been sentenced to a determinate sentence.

3. The Court of Appeals implied that Cal. Penal Code § 3041.2 is not clear on its face and was ambiguous until the California Court of Appeal clarified the real meaning of the statute. Petitioner argues that § 3041.2 is very clear on its face in that it provides on pertinent part ". . . *based on the conviction of murder* . . ." (Emphasis added) The California Constitution is equally clear where it provides ". . . *upon conviction of murder* . . ." (Emphasis added) The Court of Appeals held that because conspiracy to commit murder is punishable in the same way as murder, there is an ambiguity. The statute for murder is Penal Code § 187 while the statute for conspiracy to commit murder is Penal Code § 182. The legislature made the crime of conspiracy to commit murder a completely different offense than murder. In virtually every reported case, conspiracy to commit murder was charged separately from murder. The argument that any reasonably trained public official who deals

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The people of the State of California enacted a constitutional amendment (Article V, § 8(b)) and the legislature enacted a statute [Penal Code § 3041.2] which gave the governor the right to review and reverse the granting of parole to persons convicted only of murder, nothing more, nothing less. § 3041.2 does not grant the Governor any jurisdiction nor does it authorize the Governor to review or reverse the granting of parole to persons convicted of crimes other than murder, including but not limited to conspiracy to commit murder.

There can be no dispute as to whether the Governor should or should not be entitled to immunity for acts in clear absence of all jurisdiction and authority. Judges are not entitled to immunity for conduct which is not within their jurisdiction. "A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988)

Respondent Davis acted without any authority and in clear absence of any jurisdiction when he reviewed and reversed the grant of parole to Petitioner on two separate occasions, in 1999 and again in 2000. The District Court and the Court of Appeals do not dispute

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(Cont'd)
with crimes and parole decisions would confuse murder and conspiracy to commit murder as being treated alike is without merit and has no basis in fact. The Governor knew or should have known that conspiracy to commit murder is completely different from murder with regards to § 3041.2.

that Respondent Davis acted without jurisdiction or authority. The Court of Appeals held that Respondent Davis did not act in clear absence of jurisdiction; his actions only exceeded his jurisdiction. Because this argument really has no merit, the District Court and the Court of Appeals both added a further conclusion that although Respondent Davis' conduct was without jurisdiction and had exceeded his jurisdiction, Respondent Davis could have believed that his conduct was within his jurisdiction and authority [an argument which belongs solely in a qualified immunity analysis].

The issue then became two-fold: (1) whether a public official acting outside the course and scope of his jurisdiction and authority is merely exceeding his authority or is he acting in clear absence of jurisdiction; or (2) whether a public official who has acted in clear absence of jurisdiction, could have believed that he had jurisdiction and is entitled to qualified immunity.

The Courts of Appeals emphasized the distinction between acting in clear absence of jurisdiction and exceeding his jurisdiction without ever defining jurisdiction. Jurisdiction is defined as a court's power to decide a case or issue an order. *Black's Law Dictionary 7th Ed at 855* Once the entity/person has jurisdiction, it may seek or already have authority to enforce the laws, exact obedience, command, determine or judge those issues before the body over which it has jurisdiction. Respondent Davis had no power to decide or review whether or not Petitioner's parole should be granted. Neither the Constitution nor any statute granted him that power. Respondent Davis had no jurisdiction whatsoever to reverse that decision.

By definition, Respondent Davis could not have exceeded his jurisdiction because he had no jurisdiction to begin with. The courts have made it clear that one cannot exceed what one never had and does not have.

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Bradley v. Fisher, 80 U.S. 335 (13 Wall.), 351-352 (1871).

The Court of Appeals cited this principle at Footnote 5 of the published Opinion but then distinguished it by finding Respondent Davis conducted these reviews before the California Court of Appeal clarified the Constitution and statute and Respondent Davis did not know that he did not have jurisdiction. That conclusion belies the fact that Respondent Davis' advisors had already informed him that he has no jurisdiction over this type of case.

This Court of Appeals analysis raises the second issue, i.e. whether the analysis should be for qualified immunity not absolute immunity, i.e. was there a constitutional violation, was the law clearly established and would a reasonable public official believe that he was violating Petitioner's rights? This analysis is not applicable in determining whether a public official is entitled to absolute immunity; it is only applicable to

qualified immunity. The Court of Appeals was "mixing apples and oranges."

Based on the foregoing, Petitioner prays this Court grant the Writ of Certiorari.

II. Respondent Davis Was Not Entitled To Quasi-Judicial Immunity In That A Parole Hearing And Respondent Davis' Subsequent Review Are Not Quasi-Judicial Proceedings

Respondent Davis is not entitled to quasi-judicial immunity because the parole board hearing and the subsequent review of the parole board's decision by Respondent Davis are not quasi-judicial functions. Whether a public official is entitled to quasi-judicial immunity is determined by the functionality analysis set forth in *Butz v. Economou*, 438 U.S. 478 (1978). The non-exhaustive factors enunciated in *Butz* which are to be reviewed are: "The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges." *Id.* at 512. Other courts have expanded the Butz analysis when evaluating on a case by cases basis.

> "[1] the need to assure that the individual can perform his functions without harassment or intimidation; [2] the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; [3] insulation from political influence; [4] the importance of precedent; [5] the adversary

> nature of the process; and [6] the correctability of error on appeal."

Cleavinger v. Saxner, 474 U.S. 193, 201-02 (1985).

However, there is one essential common thread [factor] which runs through every case; the proceeding must be adversarial in nature. Absent an adversarial proceeding, it is not a quasi-judicial proceeding and no quasi-judicial immunity is available.

The Court of Appeals concluded that Respondent Davis was entitled to quasi-judicial immunity because his review of parole decisions is "functionally comparable" to a judge's role. The Court of Appeals conceded that Respondent Davis' review of the parole board findings were not adversarial in nature. The Court of Appeals holding does not comport with the conclusion that the proceeding was not adversarial.

The most basic and essential element to qualify for quasi-judicial immunity, a public official must preside over an adversarial hearing from which an appeal is possible; additionally, the public official must make factual findings and "perform other adjudicatory functions." *Hirsh v. Justices, Supreme Court of California*, 67 F.3d 708, 715 (9th Cir. 1995)[fn2]. Absent an adversarial proceeding, there can be no quasi-judicial immunity. A parole hearing and a review of the granting of parole by the Governor are not adversarial proceedings. *Franklin v. Shields*, 399 F. Supp. 309 (1975); *Furari v. Warden*, 218 F.3d 250 (3rd Cir. 2000); *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999); *State rel. Mitchell v. Dalton*, 831 S.W.2d 942 (Mo.App. E.D. 1992).

"[W]e believe a parole hearing lacks the attributes of a contested case hearing. The [parole board] hearings are not adversarial proceedings. There is no right to cross-examine witnesses. No burden of producing evidence or burden of persuasion is placed upon any specific participant. There is no right to submit rebuttal evidence. The participants merely have the opportunity to present testimony and comments. (Citations omitted) Reliance is not placed on testimony which is subject to cross-examination. (Citation omitted) While an inmate may choose to be represented by counsel at the parole hearing, see supra note 6, the lack of adversarial indica makes a parole hearing more akin to an interview than a contested case. Id. Additionally, the relationship between the "opposing" parties may not necessarily be adversarial. Although it has a right to be represented by the prosecuting attorney, the State is not an essential party to a parole hearing. It is conceivable that on occasion, all the relevant participants may favor the granting of parole rather than "favoring divergent results in the decision to be made by the agency." See id. Furthermore, the relationship between an inmate and the [parole board] is more supervisory in nature than adversarial. (Citations omitted) There is no per se "legal right" to parole. (Citation omitted) ("Parole is not a right of an inmate or parolee."). Under HRS § 353-62(a)(5), the [parole board "[p]rovide[s] continuing custody,

> control, and supervision of paroled individuals" and any prisoner who is paroled "remain[s], while on parole, in the legal custody and under the control of the paroling authority." (Citation omitted). Because the parolee remains in the legal custody of the [parole board] while on parole, the supervisory power exercised during parole appears to be a continuation of the supervisory relationship which existed when the parolee was imprisoned. For the foregoing reasons, we conclude parole hearings are not contested cases as defined in HRS chapter 91."

Turner v. Hawai'i Paroling Authority, 93 Haw. 298, 305 (App. 2000).

Petitioner cannot find even one case in any jurisdiction that holds that a parole hearing and/or a review of the parole board's decision by the governor or another government officer is adversarial in nature. On the other hand, there is an abundance of cases that condemn a party for attempting to convert a parole hearing into an adversarial proceeding.

Based on the foregoing that an adversarial proceedings is absolutely necessary to qualify for quasi-judicial immunity and neither a parole hearing nor the governor review of the parole board's decision is adversarial, Petitioner prays this court grants the Writ for Certiorari.

III. Lack Of Positive Butz Factors Weighs In Favor Of Declining To Grant Absolute Immunity

Despite the fact that at least three of the six Butz factors weighed against a finding of quasi-judicial immunity, the Court of Appeals held that Respondent Davis was entitled to quasi-judicial immunity. Although Respondent need not satisfy all of the *Butz* factors and the *Butz* factors are non-exhaustive, the Court of Appeals did not raise any factors other than the six *Butz* factors; therefore it must be assumed that the Court of Appeals could not find any other factor weighing in favor of quasi-judicial immunity. The Court of Appeals admitted that fifty percent of the *Butz* factors weighed against immunity: (1) the proceedings were not adversarial; (2) Respondent Davis is an elected politician; and (3) Respondent Davis had no duty to follow precedent. These three factors loom large in view of the fact that the three other factors that the Court of Appeals found weighed in favor of immunity are very questionable at best. Is there a need to protect a governor from harassment or intimidation? Are there real safeguards afforded to the prisoner? Is there a need to insure that Respondent Davis can perform his reviewing function without harassment? These three factors were answered in the positive by the Court of Appeals but they should have been answered in the negative.

By its nature, the job of governor subjects one to intimidation and harassment. Granting absolute immunity to a Governor will not significantly reduce that harassment or intimidation. If the Governor complies with the California Constitution and § 3041.2, there will

be no lawsuits to harass or intimidate the Governor. There are virtually no procedural safeguards afforded to those whose constitutional rights have been violated. They continue to serve in prison until a court corrects the governor's error [sometimes as long as twenty years]. Granting the governor absolute immunity from § 1983 actions merely insulates him from money damages; it does not preclude the same conduct again and again against the same and other prisoners. Merely reversing the granting of the parole is not sufficient to deter the governor from these types of conduct. The governors of California, to this day, continue to act in clear absence of jurisdiction and violate prisoners' rights by applying § 3041.2 to prisoners who have been convicted on crimes other than murder. If the prisoner does not appeal the governor's reversal of his/her parole, he continues his incarceration. Money damages is the only deterrent to this unconstitutional conduct.

Lastly, the Court of Appeals held that "Finally there is a strong need to ensure that the Governor is able to perform his reviewing function under Article V, § 8(b) without threat of harassment through civil lawsuits." *Miller v. Davis*, 521 F.3d 1142, 1146 (9th Cir. 2008) That holding is totally erroneous and unsupportable. California Constitution Article V, § 8(b) specifically does not authorize the Governor to review grants of parole where the conviction was for other than murder. Therefore, there is no need to insure that the Governor is able to perform reviews of paroles granting persons convicted of crimes of other than murder without threat of harassment because the Governor has no jurisdiction or authority to review those decisions. What is the purpose of protecting the Governor from harassment

for acts which he has no jurisdiction or authority to perform? There is none.

Based on the foregoing not even one of the Butz factors have been found to be present and Petitioner prays the Court grant the Writ of Certiorari.

IV. Parole Board Members, Acting In Their Individual Capacity, Are Not Entitled To Absolute Immunity When They Exceed Their Statutory Authority And Jurisdiction

Section 1983 is a codification of § 1 of the Civil Rights Act of 1871. The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights. The coverage of the statute is thus broader than the pre-existing common law of torts. "We have nevertheless recognized that Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). The Courts have examined common-law doctrine when identifying both the elements of the cause of action and the defenses available to state actors. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law". *United States v. Texas*, 507 U.S. 529, 534 (1993). Conversely, if the statute does not speak directly to establish an immunity, there is no basis for judicially legislating an immunity to persons who had no common law immunity when the statute was enacted.

Prior to the enactment of the Civil Rights Act of 1871, immunity for parole board officials was not well established at common law because parole boards did not exist in 1871. In 1884, Ohio became the first state to enact a statewide law governing the parole of adults by an administrative agency; prior to that time, paroles were doled out principally through the auspices of elected officials. At the time § 1983 was enacted, there was no common law immunity for parole board members because there was no parole boards and hence no parole board members to immunize. The concept of absolute immunity for parole boards has never been established by this Court. When the issue came before this Court, the Court chose not to decide that issue. *Martinez v. California*, 444 U.S. 277, 284 (1980). Although most of the circuits have erroneously held that parole board members are entitled to absolute immunity, they have not addressed the issue that parole board hearings are not adversarial and therefore quasi-judicial immunity is not available.

The federal court's abrogation of the traditional common law rule was grounded in considerations of public policy. For reasons which are not all together apparent, it became increasingly perceived that public officials would be unduly hampered, deterred and intimidated in the discharge of their duties if they are not protected from private lawsuits and liability. Accordingly, the primary rationale for the rule of absolute immunity is the promotion of fearless, vigorous and effective administration of government. *See Barr v. Matteo*, 360 U.S. 564, 571 (1959)

It is absolutely clear that quasi-judicial immunity is not mandated by the Constitution, but rather public

policy is given as the impetus." *Barr, supra,* 360 U.S. 571. The lower courts have increasingly created public policy in the absence of any legislative background or incentive. If the Congress ever intended to insulate parole board members from § 1983 actions, they have had ample opportunity to do so but have not. State legislatures have immunized most if not all of their employees from tort liability and a person, who has had his/her constitutional rights violated, sole recourse must look to the federal court. Slowly but surely, the lower federal courts are granting absolute immunity rather then qualified immunity to more and more of these state officers and the doctrine that "The king can do no wrong" is gaining momentum at a rapid pace.

This Court has established a comprehensive analysis before granting of absolute immunity for allegedly quasi-judicial functions. However, parole board members do not qualify for this test. In spite of decisions to the contrary, parole board hearings are not quasi-judicial proceedings. A parole hearing is not adversarial; it lacks the attributes of a contested case hearing. *Turner v. Hawai'i Paroling Authority, supra,* 93 Haw. at 305. The Turner court set forth eight reasons that parole hearings were not adversarial hearings [contested cases]: (1) There is no right to cross-examine witnesses; (2) No burden of producing evidence or burden of persuasion is placed upon any participant; (3) There is no right to submit rebuttal evidence; (4) The participants merely have the opportunity to present testimony and comments; (5) Reliance is not placed on testimony which is subject to cross-examination; (6) While an inmate may choose to be represented by counsel at the parole hearing, the lack of adversarial

setting makes a parole hearing more akin to an interview than a contested case; (7) the relationship between the "opposing" parties may not necessarily be adversarial. It is very conceivable that all the relevant participants may favor the granting of parole rather than "favoring divergent results in the decision to be made by the agency;" (8) the relationship between an inmate and the parole board is more supervisory in nature than adversarial. There is no per se "legal right" to parole. The parole board provides continuing custody, control, and supervision of paroled individuals and any prisoner who is paroled remains, while on parole, in the legal custody and under the control of the paroling authority. Because the parolee remains in the legal custody of the parole board while on parole, the supervisory power exercised during parole appears to be a continuation of the supervisory relationship which existed when the parolee was imprisoned.

For the reasons set forth above, Petitioner prays the Court grant the Writ of Certiorari in that the functions of the parole board members is not comparable to that of a judge and the parole board hearings are not functionally comparable to a court.

The District Court and the Court of Appeals misconstrued the allegations and claims in this matter. The Court of Appeals held ". . . parole board officials are entitled to absolute immunity when they decide to grant, deny or revoke parole." (Citing *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir. 1981) Assuming solely for purposes of this argument that parole board members are entitled to immunity when they decide to grant, deny or revoke parole, the claim in this matter is

not concerned with the granting, denying or revoking of parole; Petitioner's claim is that the parole board sent to Respondent Davis for his review, the granting of parole in violation of § 3041.2. The parole board did this twice after being told by at least one of its members that this review was a violation of § 3041.2 and Petitioner's rights.

Based on the foregoing, Petitioner Miller prays the Court grant this Writ of Certiorari on the basis that parole hearings are not adversarial and therefore, parole board members are not entitled to quasi-judicial (absolute) immunity.

V. The Eleventh Amendment Does Not Bar Suits By A Citizen Of One State Against The Same State In Federal Court

Article III, § 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their authority; . . ." The framers then placed a semi-colon at that place in the language thus ending the phrase. The framers intended that the federal courts shall have jurisdiction [not necessarily exclusive] in all cases involving the Constitution and the laws of the country.

"The Constitution limits suits in the Federal courts, inter alia, to cases arising under the Constitution and laws of the United States or involving diversity of citizenship" *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 537 (1957). Petitioner argues that this case arises

under the Constitution of the United States and therefore, the federal court has jurisdiction over this matter in so far as Respondent Parole Board is involved. It is remarkable that neither the Respondent Parole Board or the District Court addressed the jurisdictional issue in so far as Art. III, § 2. and how it applies to this matter.

Respondents Department of Corrections and California Board of Prison Terms argue that this action is barred by the Eleventh Amendment. The Eleventh Amendment does not concern itself with any issues in this matter. The Eleventh Amendment is clear as crystal and not in the least bit ambiguous. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the States of the United States *by the Citizens of another state*, or by Citizens or subjects of any Foreign State." (Emphasis added). *Eleventh Amendment, U.S. Constitution*. The Eleventh Amendment, by its own language, does not bar suits by citizens of the same state. The Eleventh Amendment bars Petitioner from suing [in a federal court] the State of Nevada, Oregon, Texas or any other state except California because this Petitioner is a citizen of California.

The courts have mistakenly construed the Eleventh Amendment as barring a citizen of one state from suing the same state in federal court; those courts are wrong and have created an illusion that the Eleventh Amendment places a limitation on one's access to the federal courts that is not contained in and does not exist in the Constitution or the amendments to the Constitution. This limitation has been erroneously created by judicial fiat and is now everyday shorthand for attorneys and judges. Thus, the phrase "'Eleventh Amendment immunity' . . . is

convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999)

> "[D]espite the narrowness of its terms, since Hans v. Louisiana, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, (citations omitted) and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'"

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

VI. State Of California Does Not Have Sovereign Immunity From Suits Brought Pursuant To The Constitution Of The United States And Its Statutes

The Constitution of the United States and subsequently the Courts were very explicit that federal courts had jurisdiction to hear cases arising under the laws of the new nation and its Constitution. Article III, § 2 of the United States Constitution provides in pertinent part: "The judicial Power shall extend *to all Cases, in Law and Equity, arising under this Constitution* . . . ;" (emphasis

added) As late as 1884, the United States Supreme Court held:

> After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties.

Ames v. Kansas, 111 U.S. 449, 471 (1884) citing *Cohens v. Virginia*, 6 Wheat. 294, 391-2.

However, six years after Ames was decided, the Court while acknowledging that up to that time, a petitioner of one state could sue that same state in a federal court pursuant to a federal question, it held, for the first time, that a petitioner of one state could not sue the state of which he was a citizen, absent consent of the state. *Hans v. Louisiana*, 134 U.S. 1 (1890).[4] The *Hans* court did not specifically overrule the *Ames* court on this issue. The *Hans* court held that the doctrine of sovereign immunity

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4. Thirty years prior, a war was fought to determine the extent and power of the federal government and especially the federal courts. The *Hans* court accomplished what the armies of the Confederacy could not do. The United States of America won the Civil War but lost the legal battle which prompted the war. *Hans*, *Plessy* and other cases limited the power of citizens to seek redress against discriminatory conduct by the states in the federal courts.

prohibited such suits against the states in a federal court. The United States Supreme Court has followed the *Hans, supra*, holding in *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944); *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973); and *Edelman v. Jordan*, 415 U.S. 651 (1974) [just to name a few] In spite of the fact that *Ames, supra*, has never been overruled, it has been generally accepted [although there are those who would argue to the contrary] that the Eleventh Amendment bars a suit by a citizen against his own state. As recent as 2004, the Court held:

> "For over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment. See Hans v. Louisiana, 134 U.S. 1 (1890). Although the text of the Amendment refers only to suits against a State by citizens of another State, we have repeatedly held that an nonconsenting State also is immune from suits by its own citizens." (Citations omitted)

Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440, 446 (2004).

Without referring to the fact that the language of the amendment itself does not bar suits by citizens against their own state and there was no legal precedent for the *Hans* holding, the courts continue to make the argument that: "The amendment maintains a crucial balance of power between state and federal interests that is central to our system of federalism." *Collins v. Alaska*, 823 F.2d 329, 331 (9th Cir. 1987)

In *People v. Dynegy, Inc.*, 387 F.3d 966 (9th Cir. 2004) the court while following *Hans supra* also cited *Ames for the principle* that in a matter where the state is the Petitioner, the matter could be removed to a federal court by the defendant. The irony of these two holdings is that while a state may not be sued by a citizen of that same state, a citizen sued by his/her state may remove the matter to federal court. In the one instance, the federal court does not have jurisdiction in the action involving a case or controversy arising under the Constitution, while in the other instance, the federal court does have jurisdiction over the matter arising under the Constitution. It all depends on who sues who. If the state is the suing party, the federal court has jurisdiction upon removal, while if the person sues the state, the federal court has no jurisdiction. The dichotomy creates a lack of mutuality and must be resolved in favor of permitting suits arising under the Constitution to be resolved in a federal court regardless of the status of the parties.

If the Framers of the Constitution and the Eleventh Amendment had intended to limit the jurisdiction of the federal courts to exclude suits brought by a citizen of one state against that same state, they could have and would have placed that provision in the Constitution and/or the amendment. It was neither the intent nor the goal of the framers to limit access of citizens to sue their home state in the federal court.

The doctrine created by the Court that precludes citizens of one state from suing that same state is contrary to the spirit and intent of Article III, § 2 of the United States Constitution which provides in pertinent

part: "The judicial Power shall extend *to all Cases, in Law and Equity, arising under this Constitution . . .*;" (emphasis added) The framers of the Constitution intended that all cases arising under the Constitution and the laws of the United States may be heard in federal courts. There are several reasons for this provision: (1) The federal courts are better equipped to determine federal questions; and (2) the state courts may be too parochial in deciding against their own state.

Petitioner further argues that Congress has abrogated any immunity that any state may claim by passage of § 1983. The basis of this argument is that the Fourteenth Amendment, § 5 gives Congress the power to enforce by statute the provisions of the Fourteenth Amendment. Congress, using that power, enacted § 1983 as the enabling statute to enforce § 1 of the Fourteenth Amendment.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress can [and did] abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under the Fourteenth Amendment, § 5 to enforce the substantive guarantees of that Amendment. *Id.* at 456. This enforcement power is a "broad power indeed." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982), citing *Ex parte Virginia*, 100 U.S. 339, 346 (1880)[fn3] It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) The Court has repeatedly

affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727-728 (2003).

Reading § 1983 in conjunction with the Fourteenth Amendment and Article III, § 2, the courts cannot preclude a citizen of one state from suing that same state in a federal court in any matter arising under the Constitution or the laws of the Unites States, especially § 1983 of the civil rights act which was enacted with the intent to enforce the provisions of the Fourteenth Amendment.

Respondents may argue that the State of California and/or any arm of the State, is not a person within the meaning of § 1983. *See Will v. Michigan*, 491 U.S. 58 (1989). This argument is without merit. In spite of Justice Brennan's fears [in his dissent in *Will*] that the courts would reject § 1983 cases even where the state was a consenting party, the federal courts have permitted actions to go forward where they found that the sovereign immunity has been abrogated by an act of Congress. In *United States v. Georgia*, 546 U.S. 151 (2005), the court permitted a § 1983 matter against the state to go forward in spite of the fact that the State of Georgia was a nonconsenting defendant. The issue of whether the State of Georgia was or was not a person within the meaning of § 1983 was not raised or discussed by anyone. In *Tennessee v. Lane*, *supra*, the matter was permitted to go forward against a nonconsenting State of Tennessee and there was no determination that Tennessee was not a person within the meaning of § 1983.

Petitioner argues that where a party is seeking to enforce provisions of the Fourteenth Amendment by use of § 1983, the defendant State is stripped of its sovereign immunity and is considered a person within the meaning of § 1983, the same as any other political entity.

Based on the foregoing, Petitioner prays this court grant this Writ of Certiorari to decide whether Article III, § 2 grants Petitioner's the right to bring a cause of action against the Respondent Department of Corrections and Board of Prisons Terms.

CONCLUSION

For the foregoing reasons, Petitioners pray the Court grant a Writ of Certiorari.

Respectfully submitted,

RICHARD HAMLISH
Attorney for Petitioner
910 G Hampshire Road
Westlake Village, CA 91361
(805) 497-6632

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 2, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-55538

D.C. No. CV-05-02625-FMC

DONALD A. MILLER,

Plaintiff-Appellant,

v.

GRAY DAVIS, as an individual,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted
December 5, 2007—San Francisco, California

Filed April 2, 2008

Before: Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges, and Louis F. Oberdorfer,* Senior Judge.

Opinion by Judge Reinhardt

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* The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

Appendix A

OPINION

REINHARDT, Circuit Judge:

The California Constitution authorizes the Governor to review a state parole board's decision granting, denying, revoking, or suspending parole "of a person sentenced to an indeterminate term upon conviction of murder." Cal. Const. art. V, § 8(b). We are asked to decide whether the Governor is entitled to absolute quasi-judicial immunity for his reversal of a parole board's grant of parole where he erroneously extends his authority to review parole decisions to an individual convicted of *conspiracy* to commit murder. We hold that he is. Accordingly, we affirm the district court's dismissal of the plaintiff's 42 U.S.C. § 1983 claims against former Governor Gray Davis.[1]

I. Background

In 1980, Donald Miller was convicted of conspiracy to commit murder and sentenced to 25 years to life in state prison. His first two applications for parole, filed in 1996 and 1998, were denied by the California Board of Prison Terms ("Board"). On February 18, 1999, the Board granted Miller's third application for parole and referred the decision to then-Governor Davis for review. Governor Davis reversed it. Miller applied for parole a fourth time and, on October 2, 2000, the Board again

1. We dispose of the remainder of Miller's claims in a separate memorandum disposition filed concurrently with this opinion.

found him suitable for parole and again referred the decision to Governor Davis. Again, he reversed it.

On August 20, 2001, the California Court of Appeal vacated Governor Davis's reversal of the Board's grant of parole on the ground that the Governor lacked authority to review the Board's 1999 and 2000 parole decisions. Specifically, the court held that Article V, § 8 of the California Constitution, and § 3041.2 of the California Penal Code, which permit the Governor to review parole decisions of inmates "sentenced to an indeterminate term upon conviction of *murder*," Cal. Const. art. V, § 8(b) (emphasis added), do not authorize him to review parole decisions of inmates "whose primary commitment offense is *conspiracy* to commit murder" (emphasis added).

Following the state court's decision, the Board reaffirmed its prior grant of parole and set a parole release date of June 18, 2002. Pursuant to California Penal Code § 3041.1,[2] Governor Davis requested that the Board review its grant of parole. The Board met en banc and again reaffirmed its decision to grant Miller parole. He was released from prison on June 18, 2002.

In 2005, Miller filed this § 1983 action against former Governor Davis, current Governor Arnold Schwarzenegger, Warden William Duncan, several state

2. Section 3041.1 allows the Governor, "[u]p to 90 days prior to a scheduled release date," to request the "review of any decision by a parole authority concerning the grant or denial of parole to any inmate in a state prison." Cal.Penal Code § 3041.1.

agencies,[3] and a number of Board members, alleging that the defendants violated his constitutional rights in prolonging his incarceration. The district court dismissed the action as to all defendants. It held that the Governor's review of parole board decisions is a quasi-judicial function and is therefore entitled to absolute immunity. Although the Governor was not authorized to review Miller's parole decision because Miller was convicted not of murder but of conspiracy to commit murder, the district court construed the Governor's decision to conduct the review as a "mistake of law" and accorded him the protection of quasi-judicial immunity. Miller appealed.

II. Discussion

Miller argues that Governor Davis is not entitled to absolute quasi-judicial immunity for his reversals of Miller's 1999 and 2000 parole grants because he lacked jurisdiction to review the Parole Board's decisions. "Whether a public official is entitled to absolute immunity is a question of law that is reviewed de novo." *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172 (9th Cir.2007).

It has long been established that judges are absolutely immune from liability for acts "done by them in the exercise of their judicial functions." *Bradley v.*

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3. The state agencies named in Miller's First Amended Complaint were the California Department of Corrections, the California Youth and Adult Correctional Agency, and the Board itself.

Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). The Supreme Court has extended such absolute immunity to other public officials who perform activities that are "functionally comparable" to those of judges. *Butz v. Economou*, 438 U.S. 478, 513, 98 S.Ct. 2894, 57 L.Ed 2d 895 (1978); *see also Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir.1981) ("If an official's role is functionally equivalent to that of a judge, the official will be granted equivalent immunity."). Such activities are sometimes referred to as "quasi-judicial." *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 420, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). "Absolute immunity flows not from rank or title . . . but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985). The Court has outlined a list of factors to consider in determining whether an official's functions are quasi-judicial in nature: (1) the need to insulate the official from harassment or intimidation; (2) the presence of procedural safeguards to reduce unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent in the official's decision; (5) the adversary nature of the process; and (6) the correctability of error on appeal. *Id.* at 202, 106 S.Ct. 496 (citing *Butz*, 438 U.S. at 512, 98 S.Ct. 2894). This list of factors is nonexhaustive, however, and an official need not satisfy every factor to be entitled to absolute quasi-judicial immunity. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923 (9th Cir.2004) (noting that the *Butz* factors are "nonexclusive").

We hold that the Governor's review of parole decisions regarding prisoners convicted of murder pursuant to Article V, § 8(b) of the California Constitution is "functionally comparable" to a judge's role and is therefore entitled to absolute immunity from damages liability. Admittedly, several of the *Butz* factors weigh against such a conclusion—the Governor's review is not adversarial in nature, there is no requirement that the Governor consider precedent in making his determination, and the Governor is, by definition as an elected official, not insulated from political influence, as Governor Davis's almost uniform denials of parole amply demonstrate. Nevertheless, we believe that the Governor's review of parole decisions "shares enough of the characteristics of the judicial process," *Butz*, 438 U.S. at 513, 98 S.Ct. 2894, to warrant absolute quasi-judicial immunity.

First, the constitutional provision and related statute provide several procedural safeguards akin to the institutional safeguards that constrain appellate courts. Article V, § 8(b) provides that the Governor, in making his decision, is limited to "the same factors which the parole authority is required to consider." *See In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.2d 104, 59 P.3d 174, 207 (2003) ("[T]he Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision."). Section 8(b) also subjects the Governor's review "to procedures provided by statute," and the relevant statute, California Penal Code § 3041.2, limits the Governor's review of parole decisions to "materials provided by the parole

authority." Cal.Penal Code § 3041.2(a); *see In re Gray*, 151 Cal.App.4th 379, 59 Cal.Rptr.3d 724, 739 (2007) (holding that the Governor erred in considering evidence that was not before the Board). Furthermore, § 3041.2 requires the Governor, if he decides to reverse or modify the Board's parole determination, to "send a written statement to the inmate specifying the reasons for his . . . decision." § 3041.2(b); *see also* Cal. Const. art. V, § 8(b) (requiring the Governor to "report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action"). Thus, like an appellate court, the Governor reviewing a parole decision is limited in the evidence and factors he may consider and must provide in writing the reasoning supporting his decision.

Second, the Governor's decision can be corrected on appeal. The California Supreme Court has held explicitly that

> the courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the Board to determine whether they comply with due process of law, and . . . such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the Board.

Rosenkrantz, 128 Cal.Rptr.2d 104, 59 P.3d at 212. Although the courts' review of the Governor's parole decisions is deferential, *see id.* at 218 ("As long as the

Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision."); *In re Smith*, 114 Cal.App.4th 343, 7 Cal.Rptr.3d 655, 678 (2003) ("[T]he Governor's decision is entitled to great judicial deference. . . ."), the "some evidence" standard of review at the very least ensures that the Governor's decisions comply with the requirements of due process, *Rosenkrantz*, 128 Cal.Rptr.2d 104, 59 P.3d at 205 ("[D]ue process of law requires that the factual basis of a decision . . . to rescind parole be supported by some evidence."); *id.* at 209 ("[B]ecause due process of law requires that a [parole] decision . . . be supported by some evidence in the record, the Governor's decision is subject to judicial review. . . ."). Where the Governor's reversal of parole is not supported by "some evidence," the California courts have not hesitated to reverse the Governor's decision. *See Smith*, 7 Cal.Rptr.3d at 678-79; *In re Smith*, 109 Cal.App.4th 489, 134 Cal.Rptr.2d 781, 794 (2003); *In re Capistran*, 107 Cal.App.4th 1299, 132 Cal.Rptr.2d 872, 876-78 (2003).

Finally, there is a strong need to ensure that the Governor is able to perform his reviewing function under Article V, § 8(b) without the threat of harassment through civil lawsuits. The Governor reviews dozens of parole grants in murder cases every year. *See* Nancy Vogel, *Gov. Paroles Second Killer*, L.A. Times, Nov. 27, 2003, at A1 (reporting that Governor Davis reviewed

294 grants of parole to defendants convicted of murder during his five years in office). If every reversal of a parole decision were to subject the Governor to potential liability, his capacity to perform the reviewing duties bestowed upon him by California's voters[4] would be seriously hindered. *Cf. Sellars*, 641 F.2d at 1303 ("If parole board officials had to anticipate that each time they rejected a prisoner's application for parole, they would have to defend that decision in federal court, their already difficult task . . . would become almost impossible.").

Thus, in light of the judicial nature of the Governor's review, the procedural safeguards that apply, and the judicial review that ensures that his review comports with due process, as well as the strong need to allow the Governor to perform his reviewing function without threat of harassing litigation, we hold that the Governor's review of parole decisions pursuant to his authority under Article V, § 8(b) and Penal Code § 3041.2 is "functionally comparable" to the role of a judge and, accordingly, that he is entitled to absolute quasi-judicial immunity for that review. This conclusion is in line with our prior decisions holding that parole board officials are entitled to absolute immunity "when they decide to grant, deny, or revoke parole." *Sellars*, 641 F.2d at 1303; *see also Anderson v. Boyd*, 714 F.2d 906, 908-09 (9th Cir.1983). Given that the Governor, in exercising his

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4. Article V, § 8(b) was added to the California Constitution via an amendment (Proposition 89) approved by California voters in the November 1988 general election. *See Rosenkrantz*, 128 Cal.Rptr.2d 104, 59 P.3d at 206.

authority under Article V, § 8(b), performs essentially the same function as parole board officials, and must review the identical record those officials review when deciding whether or not an inmate convicted of murder is suitable for parole, we see no reason to deny him the same immunity we afford those officials when they carry out their adjudicatory tasks.

Ultimately, Miller does not seriously dispute that the Governor is entitled to absolute immunity for his review of parole decisions authorized by Article V, § 8(b)—that is, grants of parole to inmates who have been convicted of murder. He argues, rather, that Governor Davis was not authorized under Article V, § 8(b) to review *his* parole decision because he was convicted not of murder but of *conspiracy* to commit murder. Thus, he argues, the Governor's reversal of that grant is not protected by absolute immunity. His argument is flawed.

The absolute immunity normally accorded officials performing quasi-judicial functions does not extend to "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). Where the official acts merely in excess of his authority, however, he will not be deprived of immunity; "rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072,

1076 (9th Cir.1986) (en banc); *see also Stump*, 435 U.S. at 356, 98 S.Ct. 1099 ("Because 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ,' the scope of the judge's jurisdiction must be construed broadly. . . ." (quoting *Bradley*, 80 U.S. (13 Wall.) at 352)) (citation omitted).

In determining judicial immunity, we have distinguished between acts "in excess of jurisdiction" and acts "in the clear absence of jurisdiction" by looking to the subject-matter jurisdiction of the judge: "[a] clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction." *Mullis v. U.S. Bankr.Court, Dist. of Nev.*, 828 F.2d 1385, 1389 (9th Cir.1987). In this case, the Governor's review of Miller's parole decision was not "clearly and completely outside the scope of [his] jurisdiction." *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir.1986). Although Article V, § 8(b) and Penal Code § 1304.2 on their face refer only to persons convicted of "murder," it was not clear, at least before the California court clarified the scope of these provisions,[5] that the

5. When, after the Governor's second denial of Miller's parole grant, the California Court of Appeal declared that Article V, § 8(b) does not extend to persons convicted of conspiracy to commit murder, the Governor was put on notice that he had no authority to reverse parole decisions relating to such individuals. From that time on he would have acted in the clear absence of jurisdiction had he reviewed a parole decision in a conspiracy to commit murder case. *See Bradley*, 80 U.S. (13 Wall.) at 351-52 ("Where there is clearly no jurisdiction over

(Cont'd)

term "murder" did not encompass conspiracy to commit murder. Conspiracy to commit murder is certainly closely related to the substantive offense. Moreover, defendants convicted of conspiracy to commit murder in California are "punishable in the same manner and to the same extent as" defendants convicted of murder. Cal.Penal Code § 182(a); *see also id.* ("[I]n the case of conspiracy to commit murder, . . . the punishment shall be that prescribed for murder in the first degree."). Thus, the state of California clearly considers the culpability of individuals who conspire to commit murder on a par with that of individuals who actually carry out the deed themselves. Given the close relationship between these two offenses, Governor Davis's review of parole decisions involving a person convicted of conspiracy to commit murder was not clearly outside the scope of his jurisdiction. *See Crooks v. Maynard*, 913 F.2d 699, 701 (9th Cir.1990) (holding that a judge did not act in clear absence of all jurisdiction where he had "colorable authority" to take the action in question).

(Cont'd)

the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, *when the want of jurisdiction is known to the judge*, no excuse is permissible.") (emphasis added). In the present case, however, Governor Davis reviewed the Board's decision granting Miller parole before the California court had clarified the scope of his authority under Article V, § 8(b).

Although Governor Davis's review of Miller's parole grant, based on his erroneous reading of Article V, § 8(b), was in excess of his authority, it was not an act done in the "clear absence of all jurisdiction." *Cf. Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.1988) (holding that a judge who "misinterpreted a statute and erroneously exercised jurisdiction" did not act in the "clear absence of all jurisdiction"). Accordingly, Governor Davis is entitled to absolute quasi-judicial immunity for his reversal of the Board's decisions granting Miller parole.[6]

The district court's dismissal of Miller's claims as to Governor Davis is

AFFIRMED.

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6. Because we hold that Governor Davis is entitled to absolute immunity, we do not reach the statute of limitations question.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 2, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-55538

D.C. No. CV-05-02625-FMC

DONALD A. MILLER,

Plaintiff - Appellant,

v.

GRAY DAVIS, as an individual,

Defendant - Appellee.

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted December 5, 2007
San Francisco, California

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix B

Before: D.W. NELSON and REINHARDT, Circuit Judges, and OBERDORFER**, Senior Judge.

Donald Miller appeals the district court's dismissal of his 42 U.S.C. § 1983 civil rights action. We affirm the district court's dismissal of Miller's claims as to former Governor Gray Davis in a separate published opinion, filed concurrently herewith. We affirm the dismissal of the remainder of Miller's claims here.

The parole board's decision whether to refer a grant of parole to the Governor for review is a quasi-judicial function, as it relies on an interpretation of the state constitutional provision and the state statute authorizing such review. Consequently, the members of the parole board are entitled to absolute immunity for their decision. *See Anderson v. Boyd*, 714 F.2d 906, 908-09 (9th Cir.1983). Thus, the district court properly dismissed Miller's claims against them.[1]

The district court also correctly held that Miller's claims against the state agencies are barred by the Eleventh Amendment, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), and that states and their agencies are not "persons" within the meaning of § 1983, *Will v. Mich.*

** The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

1. Because we hold that the defendants were entitled to immunity from Miller's suit, again, we do not reach the statute of limitations question.

Dep't of State Police, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).[2] Despite Miller's fervent request, we are not permitted to overturn such clear and well-established Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Finally, the district court did not abuse its discretion in denying Miller an opportunity to amend his complaint to state a claim against Governor Schwarzenegger and Warden William Duncan. A district court may deny a request to amend where amendment would be futile. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir.1991). Here, the district court explained that Miller "fails to explain how any claim could be pleaded as to these defendants, and the Court cannot conceive of any." Given that neither the Warden nor Governor Schwarzenegger was personally involved in any of the decisions to keep Miller incarcerated, and that respondeat superior liability is not permitted in § 1983 suits, *see Mann v. Adams*, 846 F.2d 589, 590 (9th Cir.1988), the district court did not abuse its discretion in concluding that amending Miller's complaint would be futile.

For the foregoing reasons, as well as those set forth in our separate published opinion, the district court's dismissal of Miller's § 1983 action is

AFFIRMED.

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2. Moreover, Miller's argument that Congress intended to abrogate Eleventh Amendment immunity via § 1983 is foreclosed by Supreme Court precedent. *See Quern v. Jordan*, 440 U.S. 332, 344-45, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING MOTIONS TO DISMISS DATED AND FILED MARCH 8, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 05-2625 FMC (PJWx)

DONALD A. MILLER,

Plaintiff,

vs.

GRAY DAVIS, et al.,

Defendant.

ORDER GRANTING MOTIONS TO DISMISS

The matter is before the Court on Defendant Gray Davis's Motion to Dismiss (docket # 38). The Court has reviewed the moving, opposition, and reply documents submitted in connection with this Motion. The matter was heard on March 6, 2006, at which time the parties were in receipt of the Court's tentative Order. For the reasons set forth below, the Court grants Defendant's Motion.

Appendix C

I. Allegations

Plaintiff's First Amended Complaint alleges that he was deprived of certain constitutional and civil rights arising out of a series of events following his conviction and incarceration in 1980. The complaint alleges the following: That in 1980, he was convicted of conspiracy to commit murder and was sentenced to a term of 25 years to life in prison. Plaintiff applied for parole in 1996, but was denied. Plaintiff again applied for parole in 1998 and was again denied.

Plaintiff applied for parole in 1999, and on February 18, he was deemed suitable for parole and a parole date was set. Defendants referred their grant of parole to Governor Davis, who reversed the Board's decision.

Plaintiff applied for parole in 2000, and on October 2, the board again found him suitable for parole, set a parole date, and referred the matter to the Governor. The Governor again reversed the Board's decision. On August 20, 2001, the California Court of Appeal vacated the Governor's reversal. Plaintiff was entitled to a progress hearing no later than October 19, but instead, an en banc hearing of the parole board was held on November 13, 2001. On December 19, 2001, the grant of parole to plaintiff was reaffirmed, and a release date of June 18, 2002, was set.

On March 20, 2002, the Governor requested the parole board review its decision. On April 9, the Board

again reaffirmed the grant of parole to plaintiff. "Plaintiff was paroled on June 18, 2005."[1]

II. Statute of Limitations

The former Governor, who is sued in his individual capacity,[2] moves to dismiss on the basis that the present claims are barred by the relevant statute of limitations.

Federal law determines when a § 1983 claim accrues. *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir.2000). "[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir.1999).

Section 1983 claims are subject to the forum state's statute of limitations for personal injury actions. *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir.2001). Until January 1, 2003, the California statute of limitations for

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1. Because of inconsistent statements in the pleading concerning plaintiff's release date, the Court instructed counsel for plaintiff to provide documentation concerning plaintiff's release. The Court has reviewed the documentation provided by plaintiff, which establishes that plaintiff was released from prison custody on June 18, 2002, and released from parole on June 18, 2005.

2. As a state official, the Governor may not be sued in his official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (noting that the Eleventh Amendment bars suits for damages against state officials sued in their official capacity).

personal injury actions was one year; effective January 1, 2003, the limitations period was extended to two years. *Compare* Cal.Code Civ. Pro. § 340 *with* Cal.Code Civ. Pro. § 335.1. If Plaintiff has asserted any claims that were not time barred on the effective date of the change in the limitations period, Plaintiff receives the benefit of the extension. *Mudd v. McColgan*, 30 Cal.2d 463, 468, 183 P.2d 10 (1947) ("It is settled law of this state that an amendment which enlarges a period of limitation applies to pending matters where not otherwise expressly excepted. Such legislation affects the remedy and is applicable to matters not already barred. . . ."); *accord Mojica v. 4311 Wilshire, LLC*, 131 Cal.App.4th 1069, 1072-1073, 31 Cal.Rptr.3d 887 (2005) (applying *Mudd* to the change in statute of limitations at issue here).

Section 1983 claims are also subject to state tolling rules. *Id.* at 992. Relevant to the present action, the statute of limitations may be tolled for up to two years during the time a plaintiff is incarcerated. Cal Code Civ. P. 352.1(a).

Plaintiff complains of three actions taken by Governor Davis: 1) the first reversal of the decision to parole him, made on April 13, 1999 (FAC ¶ 30); 2) the second reversal of the decision to parole him, made on January 22, 2001 (FAC ¶ 33); and 3) the request by Governor Davis that the Parole Board review its decision and rescind Plaintiff's parole, made on March 20, 2002 (FAC ¶ 38).

Appendix C

The first reversal of the Parole Board's decision was made on April 13, 1999. It is not entirely clear from the FAC when Plaintiff knew or should have known of the injury caused by this action. It is likely that he learned of the reversal shortly after it was made. *See* Cal.Penal Code § 3041.2(b) (requiring the Governor to "send a written statement to the inmate specifying the reasons for" a decision to reverse the Parole Board's decision). Nevertheless, it is very clear that at the very latest, he should have known some time before he applied for parole again on October 2, 2000. Applying the tolling provision, the statute began running no later than the date of Plaintiff's release from prison custody in June 2002. Using the longer statute of limitations, the limitations period expired in June 2004 for any claim based on the first reversal. The present action was filed in April 2005. Therefore, any claim based on the first reversal is time barred.

The claim based on the second reversal suffers from the same deficiency. The second reversal by the Governor was made in January 2001. Again, it is not entirely clear from the FAC when Plaintiff knew or should have known of the injury caused by this action, but it is likely that he learned of the decision shortly thereafter. Nevertheless, it is clear that at the very latest, he should have known of it by the date of his release from prison custody in June 2002. Applying the longer statute of limitations, the limitations period on any claim based on the second claim also expired in June 2004, well before the present action was filed. Therefore, any claim based on the second reversal is also time barred.

Appendix C

Plaintiff's argument that the Court should consider, in applying the statute of limitations, the date that he was released from parole in 2005 is unavailing. Certainly, had Plaintiff been released from prison custody at an earlier date, he would have been released from parole before 2005. Therefore, part of the damages he suffered could be said to include the curtailment of his liberty that is incident to his parolee status. However, the fact that harm may be ongoing does not affect the date upon which a claim accrues. For statute of limitations purposes, "the question is when the operative decision was made, not when the decision is carried out." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059 (2002). "[M]ere continuing impact from past violations is not actionable." *Grimes v. City and County of San Francisco*, 951 F.2d 236, 238-39 (9th Cir.1991) (internal quotation marks and citation omitted).

In *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir.2001), the Ninth Circuit considered the accrual date of the civil rights claims of a criminal defense lawyer who was denied access to her client by virtue of her exclusion from prison facilities by prison officials. The court rejected the argument that a new claim accrued each time she was denied access to an incarcerated client; instead, the court held that the lawyer's claim accrued when she received the letter notifying her of the revocation of her legal mail and visitation privileges. *Id.* The court reasoned that each subsequent denial of privileges was merely the continuing effect of the original suspension; therefore the statute of limitations on any § 1983 claim based on the denial of privileges began running upon her receipt of the letter. *Id.*

Appendix C

The *Knox* court stated that its holding was compelled by the United States Supreme Court case of *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). *Knox*, 260 F.3d at 1013. In *Ricks*, a college professor was denied tenure. *Ricks*, 449 U.S. at 252, 101 S.Ct. 498. Instead, pursuant to college policy, the professor was offered a one-year "terminal" contract; his employment was terminated (as expected) after the expiration of the contract. *Id.* at 253, 101 S.Ct. 498. The professor's subsequent race discrimination claim was barred on statute of limitations grounds because the claim accrued upon the denial of tenure because that event was understood to lead to a termination of employment. *Id.* at 257-58, 262, 101 S.Ct. 498 ("It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure.")

Here, the same is true. Plaintiff's 2005 release from parole was a "delayed, but inevitable, consequence" of his delayed release from prison. Therefore, as in *Ricks*, the delayed release from parole does not affect the limitations period. Plaintiff's claims are time barred.

Appendix C

III. Quasi-Judicial Immunity[3]

Governor Davis argues that he is entitled to quasi-judicial immunity.

This Court has already concluded that the Parole Board members were entitled to quasi-judicial immunity. *See* Court's February 9, 2006 Order. In reaching this conclusion, the Court noted that "[i]t is well settled that judges are entitled to absolute immunity for their judicial acts," and that this immunity is extended to other government officials when they make discretionary judgments that are "functionally comparable to those of judges." *Id.* at 3 (internal quotation marks and citations omitted). The Court discussed the Ninth Circuit case of *Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir.1981), which conferred quasi-judicial immunity on parole officials when they decide whether to grant, deny, or revoke parole because those decisions are functionally comparable to decisions made by judges. The Court then stated that the purpose of judicial immunity was "to enable judges to render impartial decisions, free from the fear of litigation," and noted that "[t]he same reasoning applies to a grant of quasi-judicial immunity." Court's February 9, 2006 Order

3. At oral argument in this matter, counsel for Governor Davis requested that the Court rule on his argument regarding quasi-judicial immunity. At set forth in this section, the Court has granted that request, and finds that Governor Davis is entitled to quasi-judicial immunity. Plaintiff requested an opportunity to respond to arguments in support of immunity. Because this issue was raised by the Governor in his Motion papers, Plaintiff was given the opportunity to address the issue of immunity, and he did in fact address the issue at length. *See* Opp. at 2-5. Accordingly, the Court denies Plaintiff's request.

at 4. The Court recognized that "[j]udicial immunity protects judges from liability for both erroneous findings of fact and erroneous conclusions of law" and that "quasi-judicial immunity completely shields covered officials when they perform the functions which give rise to the need for absolute protection, even when the officials make egregious mistakes in carrying out these duties." *Id.* (internal quotation marks and citation omitted). Consistent with these principles, the Court then concluded that although the decision to refer the granting of Plaintiff's parole to the Governor was found to be erroneous, it was nevertheless protected by quasi-judicial immunity. *Id.*

In this action, Plaintiff complains of actions taken by the Governor pursuant to Cal.Penal Code §§ 3041.2 and 3041.1. Section 3041.2 provides:

> (a) During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution,[4] shall review materials provided by the parole authority.

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4. The referenced provision of the California Constitution states:

> No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an

(Cont'd)

> (b) If the Governor decides to reverse or modify a parole decision of a parole authority pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision.

Cal.Penal Code § 3041.2. The duties imposed upon a Governor when he or she chooses to review a decision of the Parole Board are clearly duties that are "functionally comparable to those of judges." For instance, once a governor exercises the discretion under these provisions to review the Parole Board's decision, he or she is limited in the materials that may be reviewed and the factors that may be considered. He or she is required to provide a written statement regarding the reasons for the decision. These are classic judicial functions: Courts routinely conduct reviews of evidence, consider articulated "factors" in analyzing the evidence, come to conclusions based on the evidence, and prepare

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(Cont'd)

> indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.

Cal. Const. Art. 5, § 8(b).

written statements that outline their review, analysis, and conclusion. Moreover, here, the Governor conducted a review of a decision by a Board whose members are themselves protected by quasi-judicial immunity. In that instance, he acted much like an appellate court in reviewing a lower court's decision. Therefore, a holding that the Governor's actions are protected by quasi-judicial immunity is a logical extension of the holding that the Parole Board is so protected. This holding is rendered all the more sound when one considers that the Governor's decision is itself subject to further judicial review. *See, e.g., In re Rosenkrantz*, 29 Cal.4th 616, 658-67, 128 Cal.Rptr.2d 104, 59 P.3d 174 (2002) ("[W]e conclude that the courts properly can review a Governor's decisions whether to affirm, modify, or reverse parole decisions by the Board to determine whether they comply with due process of law, and that such review properly can include a determination of whether the factual basis of such a decision is supported by some evidence in the record that was before the Board.") Therefore, the Governor's actions pursuant to § 3041.2 are protected by quasi-judicial immunity.

The Governor's exercise of discretion pursuant to Section 3041.1 is also protected by quasi-judicial immunity. Section 3041.1 provides:

> Up to 90 days prior to a scheduled release date, the Governor may request review of any decision by a parole authority concerning the grant or denial of parole to any inmate in a state prison. The Governor shall state the

> reason or reasons for the request, and whether the request is based on a public safety concern, a concern that the gravity of current or past convicted offenses may have been given inadequate consideration, or on other factors.

Cal.Penal Code § 3041.1. Under this statute, when a governor exercises his or her discretion to request a review of a Parole Board decision, he or she also is required to make an assessment that is "functionally comparable" to those made by judges. He or she must "state the . . . reasons for the request," including specifically "whether the request is based on a public safety concern," and whether he or she believes that "the gravity of current or past convicted offenses may have been given inadequate consideration." This qualitative assessment of the Parole Board's decision is similar to those made by an appellate court. Admittedly, a governor's power under § 3041.1 is not as great as that conferred by § 3041.2, which permits a governor to affirm, modify, or reverse the Parole Board's decision; nevertheless, the request contemplated by § 3041.1 is an action that is strikingly similar to a remand (with instructions) of an action to the lower court. Accordingly, the Governor's actions pursuant to § 3041.1 is protected by quasi-judicial immunity.

Plaintiff argues that because the Governor acted beyond his authority (i.e., he acted "ultra vires"), he is not entitled to immunity. Plaintiff cites no authority for his argument, but his elaboration makes clear that his

argument is based on the "ultra vires" doctrine as it has developed in the context of sovereign immunity. *See* Opposition at 4 ("Defendant Davis' conduct was not authorized by the State of California and therefore was ultra-vires. Actions of state officials are not attributable to the State—are ultra-vires—in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that the sovereign has forbidden."). There is such an exception to the doctrine of sovereign immunity. *See De Lao v. Califano*, 560 F.2d 1384, 1391 (9th Cir.1977) (noting that ultra vires actions by a government official may create an exception to the doctrine of sovereign immunity). Here, however, the Governor is not seeking the protection of sovereign immunity; rather, he seeks the protection of quasi-judicial immunity.

Plaintiff's argument is that the Governor was clearly not authorized under § 3041.2 to review the decision granting his parole and that therefore the Governor engaged in acts that were outside of the authority granted to him—i.e., he acted ultra vires. It is true that because Plaintiff was convicted not of murder but of conspiracy to commit murder, the Governor was not authorized to review the decision granting Plaintiff's parole. However, in deciding to conduct the review, the Governor made a mistake of law. As noted previously, judicial immunity protects against mistakes of law so that "judges [are] at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18

L.Ed.2d 288 (1967). Accordingly, in light of the purpose underlying judicial immunity, Plaintiff's argument, based on the doctrine of sovereign immunity, is unpersuasive.

Accordingly, Plaintiff's claims against the Governor are barred by quasi-judicial immunity.

IV. Remaining Defendants

A. Remaining Served Defendant

One Defendant who has been served has neither answered nor moved to dismiss. Carol Bentley, a Parole Board member, was served on August 4, 2005 (*see* Proof of Service, docket # 5). She, like the other Parole Board members, is represented by the California Attorney General's Office. No allegations against her distinguish her from her colleagues with respect to the claims asserted in this action. Therefore, it appears to the Court that the Attorney General's failure to include her as a moving Defendant in the previous Motion to Dismiss (docket # 15) was an oversight.

She, like her colleagues, is entitled to quasi-judicial immunity as to Plaintiff's claims. The previous Motion to Dismiss argued that such immunity was proper, and Plaintiff was provided with the opportunity to respond to that argument. For that reason, the Court dismisses with prejudice all claims against Defendant Bentley. *See Lee v. City of Los Angeles*, 250 F.3d 668, 683 n. 7 (9th Cir.2001) (noting that a court may dismiss *sua sponte*

for failure to state a claim if the plaintiff is given the opportunity to oppose the grounds for dismissal).

B. Remaining Unserved Defendant

The sole remaining Defendant in this action, Richard Patterson, has not been served. The time for serving him has expired. *See* Fed.R.Civ.P. 4(m). Plaintiff was advised in the Court's tentative Order that he would be required to show cause at oral argument why the claims against Patterson should not be dismissed for failure to serve him. Despite lengthy oral argument, Plaintiff did not offer any argument against dismissal of the claims asserted against Patterson. For that reason, the Court dismisses all claims against Patterson.

V. Conclusion

For the reasons stated herein, the Court grants Defendant Gray Davis's Motion to Dismiss (docket # 38). All claims asserted against the former Governor are dismissed with prejudice. Additionally, all claims asserted against Defendant Bentley are dismissed with prejudice. Finally, all claims against Patterson are dismissed without prejudice.

Dated: March 8, 2006

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING MOTIONS TO DISMISS DATED FEBRUARY 9, 2006 AND FILED FEBRUARY 10, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 05-2625 FMC (PJWx)

DONALD A. MILLER,

Plaintiff,

vs.

GRAY DAVIS, et al.,

Defendant.

ORDER GRANTING MOTIONS TO DISMISS

The matter is before the Court on the following Motions:

1. Motion to Dismiss plaintiff's First Amended Complaint, filed by defendants Bordonaro, Presley, Rich, Ortega, Vasquez, Lushbough, Gillis and Koenig (docket # 15);

2. Motion to Dismiss plaintiff's First Amended Complaint, filed by defendants Schwarzenegger, California Department of Corrections, California Board of Prison Terms, California Youth and Adult Correctional Agency, and William Duncan (docket # 10).

Appendix D

I. Allegations

Plaintiff's First Amended Complaint alleges that he was deprived of certain constitutional and civil rights arising out of a series of events following his conviction and incarceration in 1980. The complaint alleges the following: That in 1980, he was convicted of conspiracy to commit murder and was sentenced to a term of 25 years to life in prison. Plaintiff applied for parole in 1996, but was denied. During the parole hearing, members of the parole board relied on certain documents which were not disclosed to plaintiff or his counsel. Plaintiff again applied for parole in 1998 and was again denied, based in part on consideration of the same documents.

Plaintiff applied for parole in 1999, and on February 18, he was deemed suitable for parole and a parole date was set. Defendants referred their grant of parole to Governor Davis, who reversed the Board's decision.

Plaintiff applied for parole in 2000, and on October 2, the board again found him suitable for parole, set a parole date, and referred the matter to the Governor. The Governor again reversed the Board's decision. On August 20, 2001, the California Court of Appeal vacated the Governor's reversal. Plaintiff was entitled to a progress hearing no later than October 19, but instead, an en banc hearing of the parole board was held on November 13, 2001. On December 19, 2001, the grant of parole to plaintiff was reaffirmed, and a release date of June 18, 2002, was set.

Appendix D

On March 20, 2002, the Governor requested the parole board review its decision. On April 9, the Board again reaffirmed the grant of parole to plaintiff. "Plaintiff was paroled on June 18, 2005."[1]

II. Motion of Parole Board Members

Quasi-Judicial Immunity:

Moving defendants contend that they are entitled to absolute quasi-judicial immunity for all of their actions in denying or granting parole to plaintiff, citing *Anderson v. Boyd*, 714 F.2d. 906, 908 (9th Cir. 1983). Plaintiff, relying on *Swift v. California*, 384 F.3d 1184 (9th Cir. 2004), argues that absolute quasi-judicial immunity is only available to the defendants when they are exercising discretionary judicial functions, and asserts that the submission to the Governor of the ultimate parole decision was not an exercise of judicial discretion.

It is well settled that judges are entitled to absolute immunity for their judicial acts. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). "When judicial immunity is extended to officials other than judges, it is because their

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1. Because of inconsistent statements in the pleading concerning plaintiff's release date, the Court instructed counsel for plaintiff to provide documentation concerning plaintiff's release. The Court has reviewed the documentation provided by plaintiff, which establishes that plaintiff was released from prison custody on June 18, 2002, and released from parole on June 18, 2005.

judgments are 'functionally comparable' to those of judges — that is, because they, too, 'exercise a discretionary judgment' as part of their function.' [citation]" *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993). In *Butz v. Economou*, 438 U.S. 478, 508 (1977), the Supreme Court extended absolute immunity to persons performing judicial functions, such as executive branch hearing examiners. And in *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir. 1981), absolute quasi-judicial immunity was extended to parole officials when performing "functionally comparable" tasks to judges, such as deciding whether to grant, deny, or revoke parole. *Sellars*, 641 F.2d at 1303.

In this case, after having granted parole to plaintiff, the moving defendants submitted their decision to the Governor for his review, pursuant to California Penal Code section 3041.2. Ultimately, the California Court of Appeal, in *In re Donald A. Miller*, concluded that the referral had been erroneous. The Court held: "Article V, section 8 of the California Constitution and section 3041.2 of the Penal Code do not, by their own terms, authorize the Governor to review the granting, denial, revocation, or suspension of parole of a person whose primary commitment offense is conspiracy to commit murder. Thus, the Governor was without authority under those provisions to review or reverse the Board of Prison Terms' 1999 and 2000 decisions to grant petitioner parole."

Plaintiff argues that defendants knowingly and deliberately violated the law when they submitted the

parole decision to the Governor in the first instance, and when they later accepted his decision to reverse the grant of parole. Plaintiff also contends that defendants violated his rights by taking into consideration certain documents which were not revealed to him or his attorney.

Even accepting plaintiff's characterization of defendants' decisions, the Court does not agree that they are subject to liability. The purpose of absolute judicial immunity is to enable judges to render impartial decisions, free from the fear of litigation. The same reasoning applies to a grant of quasi-judicial immunity. "We believe that the same degree of protection must be accorded to the decision-making process of parole board officials. Just as the decision-making process of judges must be kept free from fear, so must that of parole board officials. Without this protection, there is the same danger that the decision-maker might not impartially adjudicate the often difficult cases that come before them." *Anderson v. Boyd*, 714 F.2d at 908.

Judicial immunity protects judges from liability for both erroneous findings of fact and erroneous conclusions of law. Similarly, "quasi-judicial immunity completely shields covered officials when they perform the functions which give rise to the need for absolute protection, even when the officials make egregious mistakes in carrying out these duties." *Id.* at 909. Choosing what material to consider and deciding whether to share it with plaintiff, deciding to submit the question of plaintiff's parole release to the Governor, and

deciding to follow the Governor's orders were all part and parcel of defendants' quasi-judicial functions. They are absolutely immune from liability therefor.

Accordingly, defendants' Motion to Dismiss all claims against them (the First, Second, Fourth, Fifth, Sixth, and Seventh) is granted with prejudice, based on their absolute immunity.

III. Motion of Governor Schwarzenegger and Warden Duncan

Defendants Schwarzenegger and Duncan properly contend that no claim is stated against them in the First Amended Complaint. Other than being named as defendants, no facts are recited which refer to either of them or allege any wrongful conduct on their part.

Defendant Schwarzenegger also asserts that no cause of action can be stated against him, because he did not take office until November 13, 2003, long after plaintiff was released from prison.

Defendant Duncan is only alleged to have been the warden of the California Men's Colony where plaintiff was incarcerated.

Plaintiff requests leave to file a Second Amended Complaint. He fails to explain how any claim could be pleaded as to these defendants, and the Court cannot conceive of any. This case, as to Governor Schwarzenegger and Warden Duncan, is dismissed with prejudice.

Appendix D

IV

Motion of Defendants Department of Corrections, California Youth and Adult Authority, California Board of Prison Terms

Defendants correctly contend that the 11th Amendment of the United States Constitution bars a federal court from hearing a suit brought by a citizen against a state. "This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst School and Hospital v. Halderman*, 104 S.Ct. 900, 908 (1984).

Similarly, actions against state agencies are prohibited under the 11th Amendment. *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997). The California Department of Corrections, California Youth and Adult Authority, and California Board of Prison Terms are agencies of the state, and are, therefore, immune from plaintiff's suit.

Plaintiff argues in his Opposition that his 14th Amendment claims are brought pursuant to 42 U.S.C. §1983. This argument, however, is unavailing. A section 1983 action must be brought against a person who was acting under color of state law. Neither a state nor its agencies are persons within the meaning of section 1983. *Will v. Michigan Dept of State Police*, 491 U.S. 58, 65-70 (1988). *See also Hale v. State of Arizona*, 993 F.2d 1387, 1388, (holding that the Arizona Department of corrections is not a "person" within the meaning of section 1983.)

Therefore, plaintiff's claims against the California Department of Corrections, California Board of Prison Terms, and California Youth and Adult Correctional Agency are dismissed without leave to amend.

V. Conclusion

The Motions to Dismiss of all moving defendants are granted without leave to amend.

DATED this 9th day of February 2006.

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC FILED MAY 14, 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-55538

D.C. No. CV-05-02625-FMC
Central District of California, Los Angeles

DONALD A. MILLER,

Plaintiff - Appellant,

v.

GRAY DAVIS, as an individual,

Defendant - Appellee.

ORDER

Before: D.W. NELSON and REINHARDT, Circuit Judges, and OBERDORFER,* District Judge.

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* The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

Appendix E

The panel has voted unanimously to deny the petition for rehearing, and Judge Reinhardt has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.